

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHERINE FITZPATRICK, MOTHER  
AND PERSONAL REPRESENTATIVE  
OF THE ESTATE OF KAREN  
FITZPATRICK and RICK JOHNSON  
and JODY GRAY, PARENTS AND  
PERSONAL REPRESENTATIVE OF THE  
ESTATE OF JESSICA JOHNSON,

Plaintiffs,

vs.

ANCHOR INDUSTRIES, et al

Defendants.

No. CV-04-3123-JLQ

MEMORANDUM OPINION and  
ORDER GRANTING MOTION  
TO COMPEL and DENYING  
MOTION FOR PROTECTIVE  
ORDER

Before the court is the Motion To Compel Depositions and Documents (C.R. 33) filed by the Plaintiffs and the Motion For Protective Order (C.R. 38) filed by the United States Department of Agriculture. For the reasons hereinafter stated the Motion To Compel Depositions and Documents is GRANTED and the Motion For Protective Order is DENIED.

This is an action brought against various non-governmental Defendants by the parents of two young U. S. Forest Service firefighters, Karen Fitzpatrick and Jessica Johnson, who tragically died in July of 2001 while fighting the "Thirty-mile Fire" in north-central Washington State on behalf of the Forest Service. Two other persons, whose estates are the Plaintiffs in the companion cases, were also killed while fighting the fire. Karen Fitzpatrick and Jessica Johnson were allegedly over-run by the fire and

1 sought to save their lives through the use of “fire shelters” which the court understands  
2 were small tents designed to protect persons seeking shelter therein from fire. The  
3 Defendants herein are the manufacturers and trainers in the use of the “fire shelters.”

4 The parents of these two young women sought to take the depositions of three  
5 employees of the Forest Service in or near their places of employment or residence. The  
6 Forest Service does not contend that the location of the proposed depositions was not a  
7 convenient one for the employees. The Plaintiffs also sought the production of various  
8 documents concerning the “Thirty-mile” fire and the investigation of the Forest Service  
9 into the fire and death of the two young firefighters, Karen Fitzpatrick and Jessica  
10 Johnson.

11 The Plaintiffs appropriately noted the depositions of the three Forest Service  
12 employees for March of 2005, well in advance of the 2005 fire season. In order that these  
13 depositions and related document production will not interfere with the three employees  
14 duties during the 2005 fire season, counsel for the parties and for the Forest Service shall  
15 promptly confer and agree upon an early deposition and document production date.

16 In its Motion For Protective Order the Agriculture Department contends, in effect,  
17 that it has the absolute right to prohibit the depositions of its employees, even though the  
18 inquiry is of a limited number of employees and documents and involves the death of two  
19 young firefighter employees who were killed while serving under the direction of that  
20 agency. Further, the Agriculture Departure contends that such depositions may not take  
21 place until the Plaintiffs submit in writing the questions to be propounded by counsel for  
22 the Plaintiffs. The Agriculture Department does not contend that the information sought  
23 concerning these tragic events is privileged or adverse to the interest of the United  
24 States. To the contrary, the court can think of no reason why the Agriculture Department  
25 should not be fully cooperative in the furnishing of information concerning the death of  
26 these two young firefighters. The position of the Department concerning advance  
27 submittal of questions to be asked its employees is rejected.

1 The Agriculture Department contends that through the adoption of its own  
2 “Touhy” regulations, its employees can only be deposed if authorized by the Department  
3 and that such employees are not subject to the process of this court. The court finds this  
4 position is not well taken and the court specifically finds that under the facts of this case  
5 the Agriculture Department and its employees must comply with the Motion To Compel  
6 of the Plaintiffs. Even the Department’s own Regulations, 7 C.F.R. 1.214(b), recognize  
7 that the interest of the Agriculture Department is of importance. The court can think of  
8 no greater motive and interest that our Government and its employees should have when  
9 the death of two young firefighters is involved than a full and complete disclosure of all  
10 information in the possession of the Government to all parties to this action. From the  
11 submittals to this court, it appears that the Agriculture Department has already made  
12 complete disclosure to the media and other interested parties of the documents and  
13 information sought by the decedent’s parents. There is no valid reason for the  
14 withholding of such information to the parents of the decedents in this action.

15 The Agriculture Department contends that its Regulations and the case of *United*  
16 *States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951) authorize the seemingly  
17 arbitrary positions it has taken herein. However, the Department fails to recognize, or  
18 state in its briefing, that after *Touhy*, the United States Congress amended the statute  
19 authorizing the adoption of Regulations by governmental agencies to specifically prohibit  
20 the “withholding of information from the public or limiting the availability of records to  
21 the public.” See 5 U.S.C. § 301 (1982). As amended by this post-*Touhy* enactment,  
22 Congress has provided as follows:

23 The head of an Executive department or military department may prescribe  
24 regulations for the government of his department, the conduct of its employees, the  
25 distribution and performance of its business, and the custody, use, and preservation  
26 of its records, papers, and property. **This section does not authorize withholding**  
27 **information from the public or limiting the availability of records to the public.**

1 (Emphasis supplied concerning the post *Touhy* enactment).

2 In *Exxon Shipping Co. v. United States*, 34 F. 3d 774 (9th Cir.1994) the court made  
3 clear that this post *Touhy* enactment prohibited the government from refusing to allow  
4 ten governmental employees to be deposed concerning the Alaska *Exxon Valdez* oil spill.  
5 The fact that the United States was a party to that action was not relevant to the court's  
6 determination that governmental employees having relevant information to that spill and  
7 its effects could not be prohibited from being deposed. Nothing in 5 U.S.C. § 301  
8 warrants a determination by the Agriculture Department in this case that its employees  
9 with knowledge concerning the events leading to the death of two young firefighters in  
10 its service are not subject to the Federal Rules of Civil Procedure authorizing the  
11 depositions of all persons, be they parties or not, having relevant information concerning  
12 an action arising from those deaths. It further appears to the court that the Department  
13 employees who Plaintiffs seek to depose, and other such employees, may have the only  
14 actual information concerning the events leading up to the death of the decedents.

15 Having in mind that it is important that the depositions not be delayed this spring  
16 so as to interfere with the other duties of Department employees and the time scheduled  
17 by this court for trial, the court directs that these depositions and the production of the  
18 documents be promptly scheduled. The court notes that the Department has suggested  
19 that even if the discovery ordered herein is to take place, it may attempt to withhold  
20 "privacy" matters. In order that such a claim not prolong the discovery, the court  
21 observes that it would be proper to withhold such matters as Social Security numbers for  
22 its employees, other than the decedents. However, the Department shall not withhold  
23 addresses and telephone numbers of the deponents or other employees who discovery  
24 may reveal also have relevant information.

25 As stated, *supra*, the Motion To Compel of the Plaintiffs is GRANTED and the  
26 Motion For Protective Order of the United States Department of Agriculture is DENIED.

27 IT IS SO ORDERED.

1 The Clerk of this court shall enter this Order and forward copies to counsel.

2 **DATED** this 21st day of April 2005.

3 s/ Justin L. Quackenbush

4 JUSTIN L. QUACKENBUSH  
5 SENIOR UNITED STATES DISTRICT JUDGE  
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